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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 960

JOYCE FARNADY LUCAS,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, GERALD DALE DAVIS AND MARILYN J. DAVIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, AND REASONS RELIED ON IN SUPPORT THEREOF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, AND REASONS RELIED ON IN SUPPORT THEREOF.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Joyce Farnady Lucas, petitioner, prays that a writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered in the above entitled case on October 30, 1962.

CITATIONS TO OPINIONS BELOW.

The official report of the opinion delivered in Wisconsin Supreme Court, below, has been reported in 17 Wis. (2nd) 568. Such opinion is printed in Appendix B, Exhibit No. 1, pp. 16 to 26, *infra*, Rp. 179. A timely petition for

re-hearing was brought November 12, 1962, and it is printed in Appendix B, Exhibit No. 2, pp. 27 to 28, *infra*, Rp. 189. Arguments and reasons for re-hearing in Wisconsin Supreme Court is by printed brief; they are made part of record hereof. The opinion of the trial court is unreported; this opinion of the trial court is printed in Appendix B, Exhibit No. 5, pp. 34 to 41, *infra*, Rp. 101.

JURISDICTION.

The judgment of the Wisconsin Supreme Court is dated October 30, 1962. Appendix B, Exhibit 1a, p. 26, Rp. 178. Rehearing was denied January 10, 1963, Appendix B, Exhibit No. 3, p. 29, *infra*, Rp. 191.

The jurisdiction of this Court is invoked under section 1257 (3) of Title 28 of the United States Code. There was drawn in question and specifically set up in the trial and Supreme Court of the State of Wisconsin a substantial federal right under the United States Constitution, Amendment, Article VII, which preserves right to trial by jury and prohibits reexamination of facts except according to the common law; that there was specifically claimed in the Wisconsin Supreme Court a substantial federal right under the United States Constitution, Amendment, Article XIV, Section 1, providing that no state shall make or enforce any law which shall abridge the privileges nor deprive any person of property without due process of law, nor deny any person the equal protection of laws. These rights have been rejected by these state courts. Wisconsin statute, 270.49 provides that a trial judge, on his minutes, may set aside a verdict and grant a new trial for error, bias, prejudice or passion, or if damages are excessive. State court's decisions and judgment gave effect to this statute which in the circumstance denies litigants of said United States Constitutional rights.

Said judgment is a final judgment. The Supreme Court of the State of Wisconsin is the highest court of the state in which a decision in this case could be had. This petition is brought within 90 days of the denial of a re-hearing.

QUESTIONS PRESENTED.

1. Has a court the right to make its own conclusions mitigating the effect and extent of personal injuries contrary to the undisputed credible evidence in order to modify a jury's award, after that court determined the jury's findings has a basis in the evidence and there is no error in trial nor bias or prejudice by the jury.

2. Are litigant's U. S. Constitutional rights to jury trial under Amendment, Article VII, preserved by court granting him an option for another jury trial if court's modification is rejected where jury finding has a basis in the evidence, as found by the court.

3. Is litigant denied equal protection of laws by court adopting discretionary power to modify verdict because it is favored by few attorneys; is he deprived of property without due process if such modification is based on unrelated laws; under United States Constitution, Amendment, Article XIV, Section 1.

4. After court determines verdict has a basis in the evidence and a fair trial is had, ordering a new trial if prevailing litigant declines modification which is reached by court's detailed review of evidence, passing on credibility of witnesses and weight of evidence under Wis. statute 270.49 which permits new trial on court's minutes for excessive damages, gives effect under the circumstances which denies litigant United States Constitutional rights under Amendments, Articles VII and XIV, Section 1.

CONSTITUTION INVOLVED.

The constitutional provisions involved are the United States Constitution, Amendments, Article VII and Article XIV, Section 1. These are printed in Appendix A, p. 13, *infra*.

STATUTES INVOLVED.

The statutory provisions involved are the 1959 Wisconsin Statutes, Volume 2, Chapter 270, Section 49, Sub-section (1), page 3176, cited as 270.49 (1); Chapter 274, Section 9, subsections (1) and (2), page 3206, cited as 274.09 (1) and (2), Chapter 251, Section 26, page 3054, cited as 251.26. These are printed in Appendix A, pp. 13 to 15, *infra*.

STATEMENT.

Petitioner brought this suit against respondents to recover damages for personal injuries growing out of the negligent operation of an automobile. Issues of law are involved. Common law action.

Following a jury trial in Milwaukee County Circuit Court, Wisconsin, motions after verdict were brought in which respondents moved for a new trial because of excessive damages, and in the alternative, to change the jury's answer to question 6(a) of the special verdict from $8,000.00 awarded for petitioner's pain, suffering and disability, to the lowest award that would be assessed by an impartial and unprejudiced jury (Appendix B, Exhibit No. 4 and 4A pp. 30-34, *infra*, Rp. 117). The trial court's written decision (Appendix B, Exhibit No. 5, pp. 34-41, *infra*, Rp. 101) denied respondent's motion for new trial, stated there was no error in the trial, nor prejudice or perversity by the jury, and that the jury's answers in the verdict had support in the evidence. The trial court made no mention that the

verdict was so high as to shock the judicial conscience. But it did state the verdict was excessive by $3,700.00 and changed question 6(a) of the special verdict to $4,300.00 because, the court concluded, the fifteen-suture cuts which permanently denuded some hair on petitioner's head could be covered by her other hair, she has since married, her neurological examination was negative, she did not appear nervous to the court, and she was pleased with her new job in which she lost no time off.

The court disregarded evidence that she has lost about 10 days a year from this new job because of unbearable related headaches, neck and back pains. She was compelled to give up the work she was doing at the time of injury because she was no longer efficient at it and the strain and pressure of that work produced ill effects and disability; and respondent's doctor found the neurological examination positive and hyperactive, and that she was nervous. She is unhappy about being confined to a single, unrevealing hair style for the rest of her life, and in spite of her marriage she was interested in maintaining her delightfulness. Briefly, her other injuries and effects were an area of alopecia and permanently thinned-out hair in the area shaved for suturing which did not fully re-grow; swollen, discolored face from hemorrhaging between skin layers; tearing in neck and back muscle causing neck swelling from bleeding and edema, spasm; x-ray evidence of abnormality related to neck and back injury, with permanent scar tissue formation in those muscles formed by repair process which will impair future function; brain wave test showing poorly-developed type of rhythm and tension; arm numbness, vertigo, nausea, tremors, perspiration, diplopia, nystagmus, 6 weeks total disability (Rp. 131-166). After selecting evidence, trial court stated the verdict was too large to be supported by the evidence.

HOW FEDERAL QUESTION IS PRESENTED.

The court of first instance at which the federal questions sought to be reviewed were raised was in that trial court, Circuit Court of Milwaukee County, Wisconsin (Appendix B, Exhibit No. 6, pp. 42-43, *infra*, Rp. 123, 124). The federal questions were created by the unexpected decision of the trial court giving petitioner no prior opportunity to anticipate or assert the particular federal questions because of known sufficient evidence in the case, no error by petitioner and a conservatively low damage award which, it was felt, the court could not have modified. It was after the trial court's written decision that the particular federal questions could first be presented and the only chance to present that matter to the court, *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677.

The method by which the federal questions were raised in that trial court was by petitioner's motion on order to show case and affidavit requesting the trial court to restore the jury finding and citing the case of *Lavender* v. *Kurn*, 327 U. S. 645, and Article VII, of Amendment, United States Constitution, and argument pointing out the court's error in passing on credibility of witnesses, weight of evidence and inferences and loss of petitioner's right to jury trial.

Motion was denied on authority of *Powers* v. *Allstate Ins. Co. et al.*, 10 Wis. (2nd) 78 (Printed in Appendix B, Exhibit No. 9, pp. 50 to 63, *infra*) (trial court misstates *Powers* citation in its Order). It was in the *Powers* v. *Allstate* case (*supra*) that the Wisconsin Supreme Court decreed onto itself and all the trial courts in the state, the power to declare verdicts excessive in cases where there is no error, bias or prejudice, and by passing on credibility of witnesses, weight and selection of evidence. Trial court made no ruling on the federal questions and rights, stating

such matters were for the Appellate Court's determination (Appendix B, Exhibit No. 7, pp. 45, 46, *infra*, Rp. 126).

Judgment was entered in petitioner's favor for $939.40 plus costs, for specific miscellaneous damages but sum for personal injuries and suffering was held open pending direction of Wisconsin Supreme Court (Appendix B, Exhibit No. 8, pp. 47-49, *infra*, Rp. 114, 115).

This is a final judgment notwithstanding it was carelessly labeled interlocutory by petitioner's attorney. The Wisconsin Supreme Court made that observation too. Neither the trial court nor state supreme court has any further discretionary powers over it. The Wisconsin Supreme Court accepted this appeal; such appeals can only be had from final judgments or orders which prevent entry of a final judgment or which terminate rights, Wis. Statutes 274.09 (2) (Appendix A, pp. 13-14 *infra*); *Muscoda B. Co.* v. *Worden-Allen Co.*, 207 Wis. 22, *Zbikowski* v. *Straż*, 236 Wis. 161. Although the state supreme court reversed and remanded this instant case, this was done only for the ministerial act of properly entering judgment for the sum fixed by the trial court. The trial court's action was affirmed on appeal.

The option of accepting the modification or having a new trial should not frustrate the quest for review because of alleged lack of finality by litigant whose rights are affected, since consent to modification would render the issues moot, while on the other hand a new trial would again subject the jury's finding to court's modification under the discretionary power conferred by *Powers* v. *Allstate Ins. Co. et al*, *supra*, as complained about in this petition. The determination of petitioner's rights are final.

Appeal was taken from this judgment and order to the Supreme Court of the State of Wisconsin. Issues of law were specifically raised on this appeal which were created by the trial court's errors and the claimed shortcomings.

in the *Powers* v. *Allstate* case *(supra)*. Request was made to restore the verdict. These issues were presented by statement of "questions involved" (Rule 6, Rules of Practice in Supreme Court, 1959 Wisconsin, Statute 251.26, Appendix A, pp. 14-15 *infra*), statement of facts and argument. The questions involved were:

1. It is error for the trial court to draw its own medical conclusions mitigating the undisputed credible medical testimony as a basis for modification of a verdict.

2. A trial court's power to review evidence in detail terminates upon its finding that there was evidence to support a verdict, and there is no error in trial nor bias or prejudice by jury upon which a respondent is denied a new trial; modification of verdict thereafter, with option of new trial to petitioner gives effect to a state statute (which permits new trial on court's minutes) which denies petitioner right to jury trial under Amendment, Article VII, United States Constitution.

3. State Court's power to modify verdicts rendered in fair trial as adopted in *Powers* v. *Allstate (supra)* is a departure from common law, based on erroneous application of those laws, and permits courts to adopt their own conclusions of facts in a manner which leaves a litigant legally helpless to defend any verdict. That power also compels courts to interfere with and change all verdicts.

4. Option of new trial to a litigant who is denied judgment on a verdict rendered in a fair trial having a basis in the evidence is not a preservation of right to jury trial.

The Wisconsin Supreme Court approved the practice of a trial court in making its own mitigating medical conclusions even though they are contrary to the testimony. It held that a court's application of this method in modifying a verdict was not an abuse of the court's discretion.

That court also held that a litigant is not deprived of his

right to jury trial when he is not given judgment on the full verdict because the option of another jury trial preserves that right.

The Wisconsin Supreme Court further declared that the courts had a historical right to declare verdicts excessive and make modification through the process outlined above, and can do this in cases where there was a fair trial and an evidentiary basis for the verdict. It holds such right is conferred in cases decided before the adoption of the Wisconsin Constitution; and in order to fulfill this right a court must make a detailed examination of the facts, pass on credibility of witnesses and weight of the evidence.

Petitioner's brief on motion for re-hearing gave a detailed analysis of those cases in an effort to show that they are not authority for the court's position. Those cases are summarized in Appendix C, pp. 64 to 66 (*infra*), in order to point out that said rights are peculiarly and specifically limited to cases where there is a lack of evidence to support the verdict, or there is error in the trial or bias or prejudice of the jury which results in an excessive award in cases where the damage issue is one in which reasonable minds can reach different conclusions as for personal injuries. Those cases dealing with damages for material things permit a court to declare the jury's finding excessive and make modification since the correct damages can be computed by mathematics. The cases which hold that modification with an option for new trial does not deny litigants rights who have an obligation to pay something and their payment has been lessened, but the litigant who is entitled to the recovery either has not complained about his reduced recovery or the determination of his rights is not before the court. Re-hearing was denied.

REASONS FOR GRANTING WRIT.

A court exceeds its supervisory control over a jury verdict if it modifies such verdict by methods not recognized by the common law.

Review is needed because there has been a departure from established common law by adoption of a new theory in *Powers* v. *Allstate (supra)* and enlarged by the instant case. This theory is directly in conflict with the common law indicating the necessity for settlement by this Court in order to prevent a widespread loss of the cherished privilege in the maintenance of a jury as a fact finding body. Any curtailment of this right in cases where the court states there has been a fair trial and an evidentiary basis for the jury's finding causes an eroding of statutory and legal doctrine leading to miscarriage of justice under the law.

Under this new theory a litigant is legally helpless to save a verdict against the court's power to make its own mitigating medical conclusions as one of the bases for modifying a verdict which the court has declared to be legally good.

Since the decision in the case of *Powers* v. *Allstate (supra)* verdicts have been modified in nearly all cases tried in Wisconsin; and for more and various reasons than were originally authorized by the *Powers* case *(supra)*. Courts have even used negative testimony introduced by the opposition for a part of the body which was never claimed to be injured and the fact that such part of body received no injury is used by the court to modify the verdict.

The application of these principles is an inroad on litigant's rights. One such inroad might sanction another until the most sacred safeguards which this Country has

inherited might be diminished or frittered away, if this has not already been done by the *Powers* case *(supra)* and the instant case.

A prevailing litigant has lost his right to jury trial if he is denied judgment on the verdict, *Tennant* v. *Peoria and P. U. R. Co.*, 321 U. S. 29:

> "* * * to enter a different judgment is to deprive petitioner of a right to jury trial * * *."

The option to have another jury trial is not a preservation of that right. In the case of *In Re Simons*, 247 U. S. 232, a state court's ruling which would have compelled a litigant to be put through the difficulties, expense and anxiety of another trial and the courts to the inconvenience and energy, supported the issuance of a writ compelling the state court to give litigant her right to common law trial.

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES SAGGIO,
Attorney for Petitioner.

Dated at Milwaukee, Wisconsin, March 15, 1963.

APPENDIX A.

CONSTITUTIONAL PROVISIONS.

United States Constitution, Amendment, Article VII:

In suits at common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States Constitution, Amendment, Article XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS.

1959 Wisconsin Statutes, Vol. 2, p. 3206, 274.09 Appeals to the Supreme Court, where allowed. (1) Appeals to the Supreme Court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court of record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.

(2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding.

1959 Wisconsin Statutes, Vol. 2, p. 3176, 270.49 Motion for new trial on minutes. (1) The trial judge may entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial because of errors in the trial or because the verdict is contrary to law or to the evidence, or for excessive or inadequate damages or in the interest of justice; but such motion must be made and heard within sixty days after the verdict is rendered, unless the court by order made before its expiration extends such time for cause. When an appeal is taken from the order on such motion a bill of exceptions must be settled. Such motion, if not decided within the time allowed therefor, shall be deemed overruled. In case judgment be entered without deiding a pending motion for a new trial, the Supreme Court may direct the trial court to determine such motion within sixty days after notice of filing the remittitur.

1959 Wisconsin Statutes, Vol. 2, p. 3054, 251.26 Rules of Practice in the Supreme Court, Chapter 11, Rule 6 (2). The brief shall be entitled in the cause, and following the title there shall be a statement whether an order or judgment is appealed from, the name of the trial court and the name of the trial judge, the date of the commencement of the action and the date when the judgment or order appealed from was entered. On the following page the question or questions involvd on appeal or writ of error shall be stated briefly without detail or discussion, without names, dates,

amounts or particulars of any kind. Following each question there shall be a statement indicating whether the question was affirmed, negatived, qualified or unanswered by the court below. If a qualified answer was given to the question the appellant or plaintiff in error shall indicate briefly the nature of the qualification or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and statements in their entirety should ordinarily not exceed 20 lines and should rarely exceed one page and no other matter shall appear on the page with the statement. (In substance the question or questions should contain the type of matter found in the syllabus to a case. The question or questions should state what is to be decided,—the syllabus states what has been decided.)

APPENDIX B.

EXHIBIT NO. 1.

No. 29.

August Term, 1962.

STATE OF WISCONSIN: IN SUPREME COURT.

JOYCE FARNADY LUCAS,

Appellant,

vs.

STATE FARM MUTUAL AUTO. INS. CO., a foreign corporation, et al.,

Respondents.

APPEAL from a judgment and two orders of the circuit court for Milwaukee county: RONALD A. DRECHSLER, *Judge, Judgment and orders reversed with directions.*

On February 25, 1959, the 18-year-old plaintiff was driving her car in Milwaukee and the car was struck from the rear when it was standing still. The impact was with such force as to demolish the car's rear end. The car was pushed forward one and one-half car lengths. The frame and sides were buckled and the front seat was broken off from its tracks and was pushed backwards against the back seat. The plaintiff was thrown forward and backward in a whiplash fashion and her head was thrust against the rear view mirror.

There are no issues of liability and the only questions concern her damages. The details concerning her damages are discussed later in this opinion.

Following a trial to a jury a verdict was returned awarding her $8,000 for pain, suffering, and disability, and $1,251.96 special damages. On motions after verdict the trial judge ruled that the damage award was excessive but not perverse or the result of bias and prejudice and there being no prejudicial error committed during the trial in his opinion, he reduced the award to $4,300 (and changed the jury's answer in the verdict to the reduced amount) and gave the plaintiff the option either of accepting judgment in this amount or of taking a new trial.

An interlocutory judgment was entered December 11, 1961, for the plaintiff on the specials but holding open the amount for plaintiff's pain, suffering, and disability until the outcome of this appeal. Later the court entered an order, March 5, 1962, denying plaintiff's motion to review both the testimony and the judgment and to restore the jury award of $8,000. Still later an order was entered on March 26, 1962, by the court denying plaintiff's motion to vacate a satisfaction of the judgment by the defendant when $1,251.96, plus interest, was deposited with the clerk.

Plaintiff appeals from the judgment and the two orders.

WILKIE, *J.* The principal issue on this appeal is whether the trial court committed error in determining the jury's award of $8,000 for plaintiff's pain, suffering, and disability, to be excessive and in reducing the amount of the award to $4,300.

Where a trial judge has reviewed all of the evidence and has found a jury verdict awarding damages to be excessive and has fixed a reduced amount therefor, and has determined that there should be a new trial on damages unless the plaintiff takes his option for a judgment on the reduced amount, this court will reverse his directions "only if we find an abuse of discretion on the part of the trial court." *Makowski* v. *Ehlenbach* (1960), 11 Wis. (2d) 38,

103 N. W. (2d) 907; *Boughton* v. *State Farm Mut. Automobile Ins. Co.* (1959), 7 Wis. (2d) 618, 97 N. W. (2d) 401; *Pühl* v. *Milwaukee Automobile Ins. Co.* (1959), 8 Wis. (2d) 343, 99 N. W. (2d) 163.

In reviewing the evidence both the trial court and this court are bound by the rule stated in the case of *Kincannon* v. *National Indemnity Co.* (1958), 5 Wis. (2d) 231, 233, 92 N. W. (2d) 884, where our court held:

> "In considering whether the jury's appraisal of damages for pain, suffering, and disability is excessive, we must of course view the evidence in the light most favorable to plaintiff."

In analyzing the testimony as to the existence of any permanency of the injury or the likelihood that the injured person will endure future pain and suffering before recovery may be allowed therefor, there should be competent objective medical findings and "the unsupported subjective statements of the injured party are not sufficient." *Diemel* v. *Weirich* (1953), 264 Wis. 265, 58 N. W. (2d) 651.

In the instant case the trial judge determined that the verdict was not perverse, nor the result of bias and prejudice, and further that there was no prejudicial error committed during the trial. He did state that the verdict was too large to be supported by the evidence. *Makowski* v. *Ehlenbach, supra; Blonq* v. *Ed Schuster & Co.* (1956), 274 Wis. 237, 242, 79 N.W. (2d) 820; *Blaisdell* v. *Allstate Ins. Co.* (1957), 1 Wis. (2d) 19, 24, 82 N.W. (2d) 886. In the *Makowski Case, supra,* the court states at page 42 as follows:

> "A jury may mistakenly assume (without supporting evidence) that there have been, or will be certain effects from an injury or fix compensation for sufficiently proved effects of injury at a figure which is beyond the range of reasonably debatable amounts. In a case where it is clear to the court that the amount

> awarded must necessarily reflect an allowance for the effects of injury not sufficiently proved or reflect a rate of compensation which is beyond reason, the court will declare the damages excessive. Where the question is a close one, it should be resolved in favor of the verdict."

Applying these standards to the evidence under review, the trial court determined that the amount of $8,000 was excessive and that it "clearly reflects an allowance for effects of injury not sufficiently proved and so awards compensation which is beyond being reasonable."

An analysis of the evidence relating to plaintiff's injuries is necessary for us to determine whether or not the trial court here abused its discretion in reducing the award. When the plaintiff was thrown forward in her car her head struck the rear view mirror. She felt her neck snap to the front and back as her head moved. Her head was cut in the scalp in two places. She bled profusely and her attending physician, Dr. Anthony Verdone testified that she received "a fairly good cerebral concussion." She was not sure whether she was knocked unconscious but, in any event, in a confused and dizzy state she left the automobile and was taken by a passing motorist to the St. Mary's Hospital. There she was given first aid. Part of her head was shaved and the two head cuts were sutured, one requiring six sutures and the other nine. Both cuts were above the hair line. After this emergency treatment she left the hospital and went home. She saw her family physician, Dr. Verdone, on February 27. He took x-rays of her neck and back and these showed a flattening of the cervical spine. He detected muscle spasm and noted that she had double vision. He testified that she had pain over the lacerations on her head; she complained of headaches and dizziness; she also complained of pain in her lower back and in her neck; he found that the head cuts were edematous.

Dr. Verdone had been the family doctor for 15 years or more. He saw her weekly until about May 8, 1959. Then he did not see her again until April 22, 1961. He testified that the wounds healed normally and that he referred her for a neurological examination to Dr. Donald Ullrich on March 17. He was concerned about her nervousness and her manifestations of anxiety and depression.

Dr. Verdone's testimony about the permanency was accurately summarized as follows by the trial judge:

> "There are two scars on her scalp, which are permanent. She will have headaches for 2-3 years from this; for 1-2 years she will have neck trouble; and be nervous and have anxiety for 5 years."

Dr. Ullrich conducted a complete neurological examination and reported that "she approached normalcy, except for superficial tenderness in the two scalp cuts." She complained of headaches but not of neck pains. He reported that there were no symptoms to suggest any convulsive disorder, and no muscle spasm in her neck.

Dr. Silas Evans examined the plaintiff on behalf of the defendant insurance company. This was done on February 5, 1960. His neurological examination findings were normal. He did detect some tension in the neck muscles. Subjective complaints that she had at the time included tenderness in the muscles of the upper and lower back. Although there was slight tenderness over the two scars, the marks were almost indistinguishable because of the normal growth of hair around the cuts.

The plaintiff, prior to the accident, had worked as a clerk for $1.35 an hour. She went back to work about five weeks after the accident and at the time of trial she had been working as a stenographer at the Milwaukee Vocational School for about two and one-half years with a salary at the time of trial of about $260 per month.

In determining that the amount awarded by the jury was excessive, the trial judge summarized his findings as follows:

> "Applying such standards to the evidence of the injuries sustained by Mrs. Lucas, the amount of $8,000 is excessive, yet it, nor any other circumstance, does not indicate prejudice, perversity, or corruption. It is too large to be supported by the evidence. The amount awarded clearly reflects an allowance for effects of injury not sufficiently proved and so awards compensation which is beyond being reasonable.
>
> "She has two small scars in her scalp, which are well covered when her hair are combed over it. She is young; has married since the collision; has better employment with better compensation, and likes her work better than that which she had at the time; and her condition has not interfered with such work; she had no appearance of being nervous or in a state of anxiety at the trial; whether or not she has headaches from these injuries was not apparent and; if so, those are subjective. She had some pain and suffering incidental to her injuries.
>
> "The sum of $4,300 is determined to be the fair and reasonable amount to be allowed for her pain, suffering, permanent scars, both past and future."

We are convinced that the trial court carefully considered all of the evidence which the jury was entitled to consider. As was stated in the *Makowski Case*, *supra*, at page 43:

> "The trial judge has an advantage over the appellate court in that he not only sees and hears the testimony, which we can only read from the transcript, but he also has the same opportunity to observe the injured person as does the jury. In this case, for instance, he has seen the scars, and has his own opinion as to how serious their effect can reasonably be expected to be in the future lives of the infant plaintiffs. Because of the advantage of personal observation enjoyed by the trial judge, the rule has been evolved that

> where a trial court determines that damages are excessive, and orders a new trial for that reason, his order will be reversed and directions given by this court to enter judgment on the verdict only if we find an abuse of discretion on the part of the trial court."

Our conclusion is that the trial court did not abuse his discretion in his determination on this verdict and that the reduced amount should be approved.

Plaintiff raises a question about whether her rights under both the United States and the Wisconsin constitution have been violated by the trial court's action on the jury's verdict. It happens that, in form, the trial court did order a change in the amount of the award made by the jury. In substance, however, the trial court gave plaintiff the choice between a new trial and accepting the court-determined figure. Plaintiff was free to have a second jury make an award if she so desired. No right of plaintiff to trial by jury was violated by the judge's determining that $4,300 was a fair award because plaintiff was free to reject it. Plaintiff was deprived of the award made by one jury, but that award was found by the court to be excessive. Plaintiff's right to have a second jury make a new award was protected. The power of a court to set aside a jury verdict or damages because of being excessive has been recognized since long before the adoption of the federal or state constitution, and does not violate plaintiff's right to a trial by jury. In *Powers* v. *Allstate Ins. Co.* (1960), 10 Wis. (2d) 78, 91, 102 N. W. (2d) 393, we held:

> "The United States Supreme Court in an unanimous opinion by the first Mr. Justice Harlan held in *Arkansas Valley Land & Cattle Co.* v. *Mann* (1889), 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, that such practice of granting the plaintiff the option to remit the excess amount by which a verdict is determined by the court to be excessive does not violate the right to trial by jury guaranteed by the Seventh Amendment of the

United States constitution. A number of the state courts have directly passed upon the constitutional issue and have upheld the rule of basing the amount to be remitted upon the excess over and above a reasonable amount. Among the cases so holding are: *Sewell* v. *Sewell* (1926), 91 Fla. 982, 109 So. 98; *Burdict* v. *Missouri Pacific R. Co.* (1894), 123 Mo. 221, 27 S. W. 453; and *Alter* v. *Shearwood* (1926), 114 Ohio St. 560, 151 N. E. 667.

"As previously mentioned herein, it was acknowledged that courts had the power to set aside excessive verdicts and grant new trials long before either the federal or state constitutions were adopted. If a court has the power to hold a verdict for a certain amount excessive, it necessarily follows that it has the power to determine an amount which is not excessive. As the Missouri court well stated in *Burdict* v. *Missouri Pacific R. Co.*, *supra* (p. 242), 'If it possesses the power to say the one thing, it possesses the power to say the other.' Therefore, when a court determines that a certain amount is a reasonable amount to allow for plaintiff's unliquidated damages, it is the equivalent of holding that such amount is not excessive."

An interlocutory judgment was entered at the request of the plaintiff which provided for all of the special damages, totaling $1,251.96. The judgment also provided as follows:

"It Is Further Adjudged and Decreed that judgment in favor of plaintiff Joyce Farnady Lucas against defendants, State Farm Mutual Automobile Insurance Company, Gerald Dale Davis and Marilyn J. Davis, concerning damages for personal injuries, pain and suffering be held open pending direction by the Supreme Court of Wisconsin."

In a later separate order the trial court refused to disturb this judgment. Still later the defendant deposited enough money to take care of all of the special damages, plus interest, and then asked for a satisfaction of the judg-

ment. Plaintiff's motion, asking the trial court to direct the clerk of court not to satisfy the judgment, was denied by the trial court in an order dated March 26, 1962. The plaintiff expressly declined to accept the deposited money pending the appeal.

The record in this case discloses that there may be some uncertainty in the procedure to be followed where a trial judge has reduced a verdict under the rule of the *Powers Case, supra.* We, therefore, take this opportunity to detail the several steps to be followed:

1. On motions after verdict the trial court should enter his decision which includes a determination that the jury award is excessive but not due to perversity or prejudice, and is not the result of error occurring during the course of the trial. The decision should also include a determination by the trial court of what amount he considers reasonable. The decision should direct a new trial on the issue of damages unless the plaintiff elects to take judgment for the lesser amount.

2. A formal order should then be entered by the trial court setting aside the verdict (rather than changing the jury's award in the verdict) and granting a new trial on the issue of damages, but providing that the plaintiff, in lieu thereof may have a judgment entered for the reduced amount if he notifies the court within the time specified by the court of his election to take the reduced amount and remits the difference between the reduced amount and the jury award. Such an order may provide for an extension of the option by a specified time after remittitur in the event an appeal is taken.

3. The plaintiff may then appeal from this order: if he so desires and if it is necessary the plaintiff should first ask the trial court to extend the time for exercising his option to cover the period of his appeal.

4. If no appeal is taken and the plaintiff does not elect to take judgment for the lesser amount, the case will proceed in the normal course of events to a new trial.

5. If an appeal is taken the Supreme Court will enter its decision thereon and remit the cause either affirming the new trial order with accompanying option or reversing or modifying it.

6. If no appeal it taken and the plaintiff does elect to take judgment for the reduced amount, judgment shall then be entered accordingly and the defendant may either appeal from that judgment or seek to satisfy it.

Applying these rules to the instant case the interlocutory judgment entered should be reversed and set aside and the cause remanded to the trial court for the entry of an order setting aside the verdict and granting plaintiff a new trial on damages unless plaintiff shall notify the said court within twenty days of such order of her election to take the reduced amount of $4,300 as her award for the disputed damages and to remit the difference of $3,700. The order of March 5, 1962, denying plaintiff's motion to set aside the judgment should fall with the interlocutory judgment.

In the instant case there is the further order of March 26, 1962, denying plaintiff's motion for an order directing the clerk of court not to satisfy the interlocutory judgment of December 1, 1961. This order should be vacated and the satisfaction stricken for the reason that defendant deposited only a portion of the sum to which the plaintiff will be entitled should she elect to take the option provided and for the further reason that plaintiff did not have the use of such funds since she refused the withdrawal because of a belief that this withdrawal might adversely affect her rights on appeal. In any subsequent judgment for the plaintiff the amount now on deposit, if still on deposit, shall be credited to the defendant and the plaintiff shall

be entitled to interest on the entire award and from the date of the verdict. Because the reversal here is needed only to conform with correct procedure and appellant does not prevail on any major point of substance, costs on this appeal should be awarded to the respondent and not to the appellant.

By the Court.—Judgment and orders reversed and cause remanded for further proceedings not inconsistent with this opinion.

EXHIBIT 1A.

Office of the Clerk.

Supreme Court,

State of Wisconsin.

Franklin W. Clark, Clerk.

Madison, October 30th, 1962.

To Mr. Charles Saggio,
Messrs. Kivett & Kasdorf,
Milwaukee, Wis.

Sir:

The Court today announced decision in your case as follows:

#29 *Lucas, a minor by gdn.* v. *State Farm Mutual Automobile Ins. Co. et al.*

Judgment and orders reversed and cause remanded for further proceedings not inconsistent with the opinion.

The opinion of the Court has been filed this day. Opinions sent only on request. See Rule 56(1) (b).

Respectfully yours,

Franklin W. Clarke,
Clerk of the Supreme Court.

EXHIBIT NO. 2.

No. 29.

August Term, 1962.

STATE OF WISCONSIN: IN SUPREME COURT.

JOYCE FARNADY LUCAS,
Appellant,
vs.
STATE FARM MUTUAL AUTO. INS. CO., a foreign corporation, *et al.*,
Respondents.

MOTION FOR REHEARING.

To the Honorable the Supreme Court of Wisconsin, Madison, Wisconsin:

Now comes the above named appellant, Joyce Farnady Lucas, by her attorney, Charles Saggio, and hereby respectfully moves the Court for a re-hearing in the above entitled matter on the grounds which will be set forth in the brief of said appellant in support of the motion, and in particular, that the decisions and rules of law in support of the Appellate Court's conclusions do not justify such conclusions, but are applied in a manner repugnant to Amendments, Articles V, VII, IX and XIV of the U. S. Constitution, Article 1, sections 5 and 9, Wisconsin Constitution, the common law of the United States and Wisconsin; the said constitutional sections providing:

Article V, U. S. Const.:

> No person * * * shall be deprived * * * of property, without due process of law * * *.

Article VII, U. S. Const:

> In suits at Common law * * * no fact tried by a jury, shall be otherwise re-examined in any Court of the U. S. than according to the rules at common law.

Article IX, U. S. Const:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article XIV, U. S. Const:

> * * * No state shall make any law which shall abridge the privileges * * * of citizens of the U. S.

Article 1, sec. 5, Wis. Const:

> The right of trial by jury shall remain inviolate * * *.

Article 1, Sec. 9, Wis. Const:

> Every person is entitled to a certain remedy in the law for all injuries, or wrongs * * * to his person * * * he ought to obtain justice * * * completely * * * conformably to the laws.

270.49 Wis. Stats:

> The trial judge may entertain a motion to be made on his minutes to set aside a verdict * * * for excessive * * * damages. * * *

Dated at Milwaukee, Wisconsin, November 12, 1962.

CHARLES SAGGIO,
Attorney for Appellant.

EXHIBIT NO. 3.

Office of the Clerk,
SUPREME COURT,
STATE OF WISCONSIN.

Franklin W. Clarke,
Clerk.

Madison, January 10, 1963.

To Mr. Charles Saggio,
Messrs. Kivett & Kasdorf,
Milwaukee, Wis.

SIR:

The Court today announced decision in your case as follows:

#29 *Lucas et al.* v. *State Farm Mutual Automobile Ins. Co. et al.*

Motion for rehearing denied with $25.00 costs.

Opinions sent only on request. See Rule 56 (1) (b).

Respectfully yours,

FRANKLIN W. CLARKE,
Clerk of Supreme Court.

EXHIBIT NO. 4.

STATE OF WISCONSIN.

CIRCUIT COURT, MILWAUKEE COUNTY.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WERGIN MILLER; and KENNETH BLOCK, *Plaintiffs*, *vs.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS, *Defendants.*	Case No. 289-814.

MOTIONS AFTER VERDICT OF DEFENDANTS.

Now comes the above named defendant, Marilyn J. Davis, by her attorneys, Kivett and Kasdorf, and upon the files, records and proceedings had and taken, move the Court as follows:

1. For an order granting the motion of the defendant, Marilyn J. Davis, for directed verdict in her favor, dismissing the complaint of the plaintiffs, and each of them, upon the merits, together with costs and disbursements, the said motion for directed verdict having been timely made by the defendant, Marilyn J. Davis, following the close of testimony, or in the alternative, for an order for judgment dismissing the complaint of the plaintiffs, and each of them, together with costs and disbursements, on the ground that the evidence produced during the course of trial of the above entitled action failed to establish any liability or cause of action in favor of the said plaintiffs as against the individual defendant, Marilyn J. Davis.

Now come the above named defendants, State Farm

Mutual Automobile Insurance Company and Gerald Dale Davis, and Marilyn J. Davis, if the foregoing motion of the said Marilyn J. Davis be denied, by their attorneys, Kivett and Kasdorf, and, upon the files, records and proceedings had and taken, move the Court as follows:

1. For an order granting a new trial on the following grounds:

(a) The damages awarded by the jury to each of the plaintiffs herein, by special verdict, a copy of which is attached hereto, are excessive;

(b) The closing argument to the jury of counsel for the plaintiff was, in many instances, improper, containing a number of instances in which testimoney was misquoted and because statements were made which tended to inflame and prejudice the jury against the defendants;

(c) In the interests of justice.

2. If the foregoing motion be denied, then the defendants move the Court as follows:

(a) For an order changing the answer of the special verdict to question No. 6 (a) from "$8,000.00" to an amount of damages equivalent to the lowest damage award that would be assessed by an impartial and unprejudiced jury, or, the option of a new trial to the plaintiff, Joyce Farnady Lucas.

(b) That the answer to question No. 7 (a) be changed from "$600.00" to an amount of damages equivalent to the lowest damage award that would be assessed by an impartial and unprejudiced jury, or, the option of a new trial to the plaintiff, Audrey Wergin Miller.

(c) That the answer to question No. 8 (a) be changed from "$100.00" to an amount of damages equivalent to the lowest damage award that would be assessed by an impartial and unprejudiced jury, or, the option of a new trial to the plaintiff, Kenneth Block.

KIVETT AND KASDORF,
Attorneys for Defendants.

EXHIBIT 4A.

STATE OF WISCONSIN.

CIRCUIT COURT, MILWAUKEE COUNTY.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WERGIN MILLER; and KENNETH BLOCK,
Plaintiffs,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS,
Defendants.
} Case No. 289-814.

SPECIAL VERDICT.

Question 1:

At the time of and just before the collision, was defendant, Gerald Davis, negligent with respect to:

(a) Keeping a proper lookout?

Answer: Yes Dissenting: _____

_____

(b) Speed of the automobile he was driving?

Answer: Yes Dissenting: _____

_____

Question 2:

If any subdivision of question 1 is answered "Yes", then answer the corresponding subdivision of this question: Was such negligence of defendant, Gerald Davis, so found by such answer, an efficient cause of the collision with respect to:

(a) Keeping a proper lookout?

Answer: Yes Dissenting: _____

_____

(b) Speed of the automobile he was driving?

Answer: Yes Dissenting: _____

_____

Question 3:

At the time of and just before the collision, was the plaintiff, Joyce Farnady Lucas, negligent?
Answer: No (answered by the court)

Question 4:

At the time of and just before the collision, was the plaintiff, Audrey Wergin Miller, negligent?
Answer: No (answered by the court)

Question 5:

At the time of and just before the collision, was the plaintiff, Kenneth Block, negligent?
Answer: No (answered by the court)

Question 6:

What sum of money will reasonably compensate the plaintiff, Joyce Farnady Lucas, for the damages which she sustained as a natural result of the collision with respect to:

(a) Pain, suffering and disability?
Answer: $8,000.00 Dissenting: ROBERT J. WASNIEWSKI
LESTER B. WILLIAMS

(b) Loss of wages to date?
Answer: $356.40 Dissenting: _____
_____

(c) Medical and hospital expenses to date?
Answer: $175.00 Dissenting: _____
_____

(d) Automobile damages to date?
Answer: $408.00 Dissenting: _____
_____

Question 7:

What sum of money will reasonably compensate the plaintiff, Audrey Wergin Miller, for the damages which she sustained to date as a natural result of the collision with respect to:

(a) Pain and suffering?
Answer: $600.00 Dissenting: ARTHUR C. WEGNER
JOHN B. GRIFFIN

(b) Medical and hospital expenses:
Answer: $53.00 Dissenting: _____
_____

Question 8:

What sum of money will reasonably compensate the plaintiff, Kenneth Block, for the damages which he sustained to date, as a natural result of the collision with respect to:

(a) Pain and suffering?

Answer: $100.00 Dissenting: _____

_____

(b) Hospital expenses?

Answer: $3.00 Dissenting: _____

_____

Dated: October 6th, 1961.

FREDERICK ROEMHELD,
Foreman.

EXHIBIT NO. 5.

STATE OF WISCONSIN.

CIRCUIT COURT, MILWAUKEE COUNTY.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WERGIN MILLER; and KENNETH BLOCK,
Plaintiffs,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS,
Defendants.

Case No. 289-814.

DECISION.

Automobile collision with rear end of parked automobile motions after verdict of the jury. The motions of the plaintiffs, Audrey Wergin Miller and Kenneth Block, for judgment upon the verdict with their taxable costs and disbursements will be granted.

As to plaintiff, Joyce Lucas, the defendants' motion to change certain of the answer to subdivision (a), the damage question, will be granted to such amount as the court may determine as a fair and reasonable award under the evidence herein, and judgment will then be granted to that plaintiff upon the verdict with the amount so reduced, and with her taxable costs and disbursements. That answer will be reduced and changed to $4,300. Her total damages will then amount to $5,239.40.

The motion of the defendant, Marilyn J. Davis, for dismissal of the action against her will be denied. Gerald Davis was driving the automobile owned by then Marilyn J. Sikkink, now his wife. Earlier that evening, they had been riding in his automobile. When they were finished at one place, they decided to take a social ride that evening and she suggested that he drive her automobile, on the hospital parking lot, because she had not driven it much that week and she felt that it should be run to charge the battery. For that reason, her automobile was used, driven by him, with her at his side, when the collision occurred because he was trying to remove what turned out to be one of her shoes, which had gotten stuck under the gasoline accelerator, and therefore he was found causally negligent as to lookout and speed under the circumstances. Under such evidence, he was her agent at the time in question. *Sercy* v. *Jones*, 235 Wis. 109, 110-114.

All of the other motions after verdict will be denied.

It would serve no useful purpose to review the evidence further in detail as to the liability features. Suffice it to say that there is sufficient evidence to sustain the verdict of the jury, except as to the answers of the amount which is to be reduced. No other changes in the answers would be justified. *Trautman* v. *Charles Schefft & Sons Company*, 201 Wis. 113, 115. No prejudicial error occurred during the course of the trial.

It cannot be said that the other answers to the questions sought to be changed or stricken are clearly contrary to the evidence or contrary to any inference which the jury could fairly draw from the evidence. The case is not within what is required for granting a new trial, as enunciated in *Grammoll* v. *Last*, 218 Wis. 621, 632.

Where reasonable minds may differ as to the conclusions of ultimate facts to be drawn from the evidence, the answers of the jury must be upheld, if otherwise sufficient. *Vierig* v. *Southwestern Wisconsin Gas Co.*, 212 Wis. 394, 395. If the evidence is conflicting or if the inferences from credible evidence are doubtful and uncertain, the proper inferences to be drawn are for the jury, and the court should not substitute another answer after verdict. *Czerniakowski* v. *National Ice & Coal Co.*, 252 Wis. 112, 115.

Because of the excessiveness of damages assessed by the jury in answer to question 6 (a), for the pain and suffering and disability of Mrs. Lucas, $8,000, which the court believes is not due to perversity nor prejudice, and is not the result of error, if any, occurring during the course of the trial, that plaintiff is granted the option of remitting the excess of $3,700 over $4,300, which latter sum the court determines is the reasonable amount of her damages included in that subdivision; or of having a new trial on the issue of damages only. Such option shall be by way of consenting to the entry of judgment for such reduced amount, plus the jury's answers to the other subdivisions of question 6, or the sum of $5,239.40, damages in all, plus her taxable costs and disbursements." Such option shall be exercised in writing, to be served and filed within 21 days from the date of this decision, of which a copy is being mailed to each attorney, and to Richard F. Yanisch, the former guardian ad litem of the minor plaintiffs for his information. In the event that such option is so exercised, then judgment will be granted to her for such amount.

On the first day of trial, October 3, 1961, when it appeared that two of the minors had become of age, and the other would be, on October 13, 1961, Mr. Yanisch was released as guardian ad litem, with his fee for services rendered fixed at $150, in all, the payment thereof to await the outcome of the action; and if the plaintiffs prevailed, the amount was to be paid by the defendants, as part of the taxable costs, the allocation of such amount to be pro-rata to each plaintiff according to the amount of their recoveries, respectively.

The defendants' attorney will prepare and submit for signature the order for judgment in accordance with this decision, which order is to be served upon plaintiffs' attorney. In the event such option is not so exercised within such 21-day period, then a new trial will be granted upon the issue of damages as to Mrs. Lucas. In the event that such option is so exercised, the plaintiffs' attorney will proceed with the taxation of costs and disbursements, the entry of judgment and service of notice thereof.

The extent of the injuries to Mrs. Lucas, as disclosed by the evidence, will be next considered.

The collision occurred on February 25, 1959. She was born on October 13, 1940; married on April 8, 1961. She has been a stenographer at the Milwaukee Vocational School for about 2½ years, at a salary now about $260 a month. She was sitting in the middle of the front seat of her parked auto, with Kenneth Block in back of the wheel and Audrey Wargin at her right, at about 11:00 P.M., at the west curb of Lincoln Memorial Drive. The other car ran into the rear end of her car. She was thrown forward, her head striking the rear-view mirror; the force of the impact and the weight on the seat broke off the seat and she landed next to the rear seat in the car. She felt her neck snap to front and back as her head moved. Her head

in the scalp was cut in two places. Her face swelled up and part became black and blue; she was "scared", confused and dazed when she got out of the car. A passing automobile stopped and took the three plaintiffs to St. Mary's Hospital, a short distance away. They were taken care of by a doctor in the first-aid section. He shaved hair off of her head, near the two cuts, and sutured the two cuts; and she was discharged from the hospital. They were there from 2 to 2½ hours. One cut was in the middle of the frontal area above the hairline, and the other to the left above the ear above the hairline. She went to Dr. Verdone's office the next day. At the time of the collision, she was working as a clerk at the J. W. Speaker Corporation, at $1.35 an hour. She returned to work on April 4, 1959. She was worried, nervous, easily aggravated, and left that employment. Dr. Verdone took x-rays of her neck and back, and she had diathermy treatments at his office therefor. She was examined by Dr. Ullrich, a neurologist, by reference of Dr. Verdone. Those doctors told her to take aspirin for her headaches.

Dr. Verdone saw her on February 27, 1959. She had a bump on the side of her forehead, a bandage on her head, and was walking with pain and stiffness. She had a 2-inch long laceration above the hairline over her right forehead, and a 1½ inch one over the left side of her face above the hairline, the first of which was closed with 9 sutures, and the other, with 6. There was swelling there. The sutured areas had been shaved clean of hair. She had had a cerebral concussion, evidenced by nausea, double vision, and dizziness, from the force of the blow. His diagnosis was 2 lacerations of scalp; cerebral concussion; and sprain of neck. She had a whiplash type of injury to her neck, reaching into the upper dorsal area. There was no fracture of bone. She was more nervous than before from the collision. The lacerations healed as usual. Because

of her complaints, four weeks after the collision, he referred her to Dr. Ullrich, who reported to him. There are two scars on her scalp, which are permanent. She will have headaches for 2-3 years from this; for 1-2 years she will have neck trouble; and be nervous and have anxiety for 5 years. The sutures were removed on March 2, 1959. He saw her 8 times thereafter, the last on May 9, 1959; and next on April 22, 1961. Dr. Ullrich's report was that she approached normalcy, except for superficial tenderness in the two scalp cuts, on March 12, 1959. Other than that tenderness, his findings were within normal limits. She only complained of headaches.

Dr. Evans, one of he rebuttal witnesses, examined her on February 6, 1960. His neurological examination findings were normal. She had some tension of the neck muscles into her back. There was slight tenderness over the two scars which were almost indistinguishable because of the normal growth of hair around them, with no thinning of hair except as to the scars themselves.

While amounts of damages awarded in reported cases cannot be conclusive as to the damages in another case, because the circumstances are not the same, yet there can be a consideration of reported Wisconsin cases in coming to what a fair and reasonable amount would be in a given case.

The damages in the instant case are largely two scars in or about the hair of her scalp, with no hair in or on those scars of 2 inches and 1¼ inches long; headaches, and nervous anxiety, with the pain and suffering incidental thereto, above described.

A case which can be used as a guide is that of *Rude* v. *Algiers*, 11 Wis. (2) 471, 483-484. There a schoolteacher was injured in an automobile accident. She received a cut 1½ inches long on the chin and another 2½ inches long

on the left knee that required suturing, the temporary loosening of 3 teeth, and bruises and abrasions distributed over her body. There was considerable bleeding. She had a severe headache for some time, and was confined to the hospital for 3 days. The left knee still cramped up when in one position for a considerable length of time. The only permanent injuries were the scars to the chin and knee. The jury awarded $2000 for such injuries. The supreme court said, at page 485, that the damages awarded seem high but a majority of the court are not prepared to hold they are excessive.

The supreme court in *Makauski* v. *Ehlenbach*, 11 Wis. (2) 38, at 41-42, reviewed and set out the standards to be applied in reviewing a jury verdict on damages. It there said, at pp. 41-42:

> "The problem of achieving fairness in assessing damages for personal injury is fraught with difficulty. Theoretical nicety is impossible. Under our judicial system, we rely primarily upon the good sense of jurors to determine the amount of money which will compensate an individual for whatever loss of well-being he has suffered as a result of injury".

Further, it said, at pp. 42-43:

> "We should add to the statement just quoted that there are cases where the amount of an award may not indicate prejudice, perversity, or corruption, yet is too large to be supported by the evidence. A jury may mistakenly assume (without supporting evidence) that there have been, or will be certain effects from an injury or fix compensation for sufficiently proved effects of injury at a figure which is beyond the range of reasonably debatable amounts. In a case where it is clear to the court that the amount awarded must necessarily reflect an allowance for the effects of injury not sufficiently proved or reflect a rate of compensation which is beyond reason, the court will declare the damages excessive. Where the question

is a close one, it should be resolved in favor of the verdict".

Applying such standards to the evidence of the injuries sustained by Mrs. Lucas, the amount of $8000 is excessive, yet it, nor any other circumstance, does not indicate prejudice, perversity, or corruption. It is too large to be supported by the evidence. The amount awarded clearly reflects an allowance for effects of injury not sufficiently proved and so awards compensation which is beyond being reasonable.

She has two small scars in her scalp, which are well covered when her hair are combed over it. She is young; has married since the collision; has better employment with better compensation, and likes her work better than that which she had at the time; and her condition has not interfered with such work; she had no appearance of being nervous or in a state of anxiety at the trial; whether or not she has headaches from these injuries was not apparent and, if so, those are subjective. She had some pain and suffering incidental to her injuries.

The sum of $4300 is determined to be the fair and reasonable amount to be allowed for her pain, suffering, permanent scars, both past and future.

As to Mrs. Miller and Mr. Block, the amounts awarded by the jury for their pain and suffering, $600 and $100, respectively, may be high but not, the court believes, excessive, and were within the province of the jury under the evidence as to their injuries.

Dated: November 15, 1961.

ROSOLD A. DRECHSLER,
Circuit Judge.

cc: John R. Henderson,
Charles Saggio,
Richard F. Yanisch.

EXHIBIT NO. 6.

MILWAUKEE COUNTY,
STATE OF WISCONSIN,
CIRCUIT COURT,
CIVIL DIVISION.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WEEGIN MILLER; and KENNETH BLOCK.
Plaintiffs.
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS.
Defendants.
} Case No. 289-814.

STATE OF WISCONSIN, }
MILWAUKEE COUNTY. } ss.

AFFIDAVIT.

CHARLES SAGGIO, being first duly sworn, deposes and says he is the attorney for plaintiff Joyce Farnady Lucas and makes this Affidavit on her behalf. That judgment was entered in the said action on December 11, 1961 and Notice of Entry thereof was served January 8, 1962.

This Affidavit is made in support of an Order to Show Cause for review of the said judgment for the reason that the said judgment was directed by the said Court contrary to the provisions of Article VII of the United States Constitution which provides:

"In suits at Common Law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the laws of the Common Law."

That said judgment was directed by the said Court contrary to the provisions of the Constitution of the State of Wisconsin, Article 1, Section 5 thereof which provides:

"The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy. . . ."

That said judgment was directed by the Court contrary to the laws of the United States which provide that a Trial Court shall not undertake to search the record and consider facts again for them to decide that the jury should have found otherwise or that a jury finding is not determinative of the issue. *Lavender* v. *Kern*, 327 U. S. 645.

/s/ CHARLES SAGGIO.

Subscribed and sworn to before me this 20th day of February, 1962.

/s/ CONCETTA F. ZYLKA,
Notary Public, Milwaukee Co., Wis.

My Commission expires: 9-1-63.

EXHIBIT 6A.

MILWAUKEE COUNTY,
STATE OF WISCONSIN,
CIRCUIT COURT,
CIVIL DIVISION.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WERGIN MILLER; and KENNETH BLOCK,
Plaintiffs,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS,
Defendants.
} Case No. 289-814.

ORDER TO SHOW CAUSE.

Upon all the files, records, proceedings and evidence; on the Affidavit hereto attached, and on motion of Charles Saggio, attorney for plaintiff Joyce Farnady Lucas,

IT IS ORDERED that the defendants show cause before that branch of the Circuit Court, Milwaukee County, Wisconsin, presided over by Honorable Ronold A. Drechsler, Circuit Judge, in the Court House, on the 26th day of February, 1962 at 9:00 A. M., or as soon thereafter as counsel can be heard, why the Court should not review the judgment herein entered December 11, 1961 and restore the jury verdict.

LET A COPY of this Order to Show Cause be served on defendants' attorneys, Kivett & Kasdorf, at least 48 hours before the time set for hearing herein.

BY THE COURT:
/s/ RONOLD A. DRECHSLER,
Circuit Judge.

EXHIBIT NO. 7.

STATE OF WISCONSIN.
CIRCUIT COURT, MILWAUKEE COUNTY.
CIVIL DIVISION.

JOYCE FARNADY LUCAS, a minor, by her guardian *ad litem*, Charles Saggio; AUDREY WERGIN MILLER; and KENNETH BLOCK,
Plaintiffs.

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, GERALD DALE DAVIS and MARILYN J. DAVIS,
Defendants.

Case No. 289-814.

ORDER.

Plaintiff Joyce Farnady Lucas' motion for an Order of the Court to review the judgment entered herein, December 11th, 1961, upon the transcribed testimony in the trial of said action, which transcription and examination thereof was completed following the entry of said judgment, and accordingly, to restore the verdict of the jury herein relating to the damage award for injuries to Joyce Farnady Lucas, for the reason that the judgment as directed by the Court was contrary to the evidence and contrary to and violated plaintiff's constitutional rights, in particular, rights under Article VII of the United States Constitution and the Laws of the United States, together with Article 1 Sec. 5 of the Wisconsin Constitution, coming on to be heard on the 26th day of February, 1962, in that branch of the Circuit Court presided over by the Honorable Ronold A. Drechsler, Circuit Judge, plaintiff appearing by her

attorney Charles Saggio, and defendants appearing by their attorneys Kivett and Kasdorf, being represented by Mr. John R. Henderson, and the Court hearing argument of Counsel, and that in view of the case of Powers *vs.* Allstate Ins. Co. 11 Wis. (2) 426, the matter of plaintiff's constitutional rights under Section VII United States Constitution, Federal Laws and Sec. 5, Article 1 Wisconsin Constitution are matters for consideration of the Appellate Court it is ORDERED that plaintiff's motion be and is hereby denied.

Dated at Milwaukee, Wisconsin, this 5th day of March, 1962.

/s/ RONOLD A. DRECHSLER,
Circuit Judge.

EXHIBIT NO. 8.

STATE OF WISCONSIN.

CIRCUIT COURT, MILWAUKEE COUNTY.

JOYCE FARNADY LUCAS, a minor by her guardian *ad litem*, Charles [redacted]aggio, AUDREY WERGIN MILLER and KENNETH BLOCK,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corp., GERALD DALE DAVIS and MARILYN J. DAVIS,

Defendants.

Case No. 289-814.

INTERLOCUTORY JUDGMENT.

This action having come on for trial October 3, 1961, and the jury having rendered its verdict on the 6th day of October, 1961 before the Honorable Roland A. Drechsler, Circuit Judge presiding, and plaintiffs having brought motions for increase of the jury awards in respect to the items of damages for each plaintiff, or in the alternative for judgment on the verdict for each plaintiff, and defendants bringing motions for new trial, or in the alternative for reduction of the awards to each plaintiff, and the Court having rendered its written decision on November 15, 1961, on said motions, which decision approved the verdict in all respects except the jury's answer to Question 6(a), which was changed from $8000.00 to $4300.00, requiring plaintiff Joyce Lucas to remit the sum of $3700.00 and consenting in writing to the entry of judgment for such reduced amount plus the awards for car damage, medical expense and wage loss, costs, disbursements and Guardian Ad Litem

fees, to be filed within 21 days of the date of the decision, or, in the alternative, a new trial on the question of injuries; further, having brought motions for dismissal of said actions against defendant Marilyn J. Davis, which motions were denied except as above stated, and the Court having modified said decision and order for judgment on December 5, 1961, to the extent that plaintiff Joyce Farnady Lucas is permitted to enter an interlocutory judgment for the awards in verdict Questions 6(b), 6(c) and 6(d) plus costs and disbursements, further providing that the option for plaintiff Joyce Farnady Lucas to consent to entry of judgment for the reduced amount relating to question 6(a) of said verdict or having a new trial on the issue of injuries only, be held open pending determination of said question on appeal and to twenty (20) days after the remittitur from the Appellate Court; and said Court further ordering that plaintiff Joyce Farnady Lucas be denied the right to enter a judgment, for the purpose of appeal, without consenting to accept the reduced amount relating to Question 6(a) of the verdict;

IT IS ADJUDGED AND DECREED that the plaintiff Joyce Farnady Lucas have judgment against defendants, State Farm Mutual Automobile Insurance Company, Gerald Dale Davis and Marilyn J. Davis who reside at 2330 West Roosevelt Drive, Milwaukee, Wisconsin, in the sum of $939.40 plus interest thereon from date of verdict, costs and disbursements.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff Audrey Wergin Miller have judgment against the defendants, State Farm Mutual Automobile Insurance Company, Gerald Dale Davis and Marilyn J. Davis who reside at 2330 West Roosevelt Drive, Milwaukee, Wisconsin, in the sum of $653.00 plus interest, costs and disbursements.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff Kenneth Block have judgment against defendants, State Farm

Mutual Automobile Insurance Company, Gerald Dale Davis and Marilyn J. Davis who reside at 2330 West Roosevelt Drive, Milwaukee, Wisconsin, in the sum of $103.00 plus interest, costs and disbursements.

IT IS FURTHER ADJUDGED AND DECREED that judgment in favor of plaintiff Joyce Farnady Lucas against defendants, State Farm Mutual Automobile Insurance Company, Gerald Dale Davis and Marilyn J. Davis, concerning damages for personal injuries, pain and suffering be held open pending direction by the Supreme Court of Wisconsin.

Dated at Milwaukee, Wisconsin, this 11th day of December, 1961.

FRANCIS X. MCCORMACK,
Clerk of Circuit Court.

By: .....
Deputy Clerk.

EXHIBIT NO. 9.

No. 222.

August Term, 1959.

STATE OF WISCONSIN: IN SUPREME COURT.

MARY AGNES POWERS,
Appellant,
vs.
ALLSTATE INSURANCE CO., a foreign insurance corporation, *et al.*,
Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county: RONOLD A. DRECHSLER, Circuit Judge. *Modified, and, as modified, affirmed, with directions.*

Action by the plaintiff Mary Agnes Powers to recover damages for personal injuries while she was a passenger in an automobile as a result of a collision which occurred between it and another motor vehicle. The defendants are the two drivers and their insurance carriers.

The action was tried to the court and a jury. The jury returned a special verdict wherein it was found that both drivers were causally negligent, and that the plaintiff sustained a permanent injury. The verdict fixed the amount of the plaintiff's damages for pain and suffering to the date of trial at $1,500 and for permanent injury at $5,000. The plaintiff had made no claim for reimbursement for any medical expenses and no question with respect to the same was included in the verdict. In their motions after verdict the defendants moved the court to change the answer of the jury to the question of the verdict which found that plaintiff had sustained a permanent injury to her left knee from "yes" to "no", and the answer of the verdict

which determined the plaintiff's damages for permanent injury from $5,000 to zero; and, in the alternative, prayed for a new trial because the damages were excessive.

Following the argument upon the motions after verdict the trial court filed a memorandum decision in which it was determined that there was no proper expert medical testimony in the record which would support the finding of permanent injury. By order entered the answers to the questions in the verdict relating to permanent injury were changed as prayed for by the defendants' motions after verdict. Judgment was entered September 3, 1959, in favor of the plaintiff and against the defendants in the sum of $1,500, together with costs and disbursements. From such judgment the plaintiff has appealed.

CURRIE, *J.* The questions which the court deems are presented by this appeal are:

(1) Is there credible medical evidence to sustain the jury's finding of permanent disability?

(2) If such question be answered in the affirmative, are the damages awarded for such permanent disability excessive?

(3) If such damages are excessive, what is the proper option to extend to the plaintiff as an alternative to granting a new trial as to damages?

The accident occurred October 16, 1955. At the time the plaintiff was twenty years of age and was a first year student at Alverno College in the nurses' training course. Her parents then resided at Harvard, Illinois, and she was then living at the college dormitory. As a result of the collision her left knee was thrown violently against the dashboard of the car in which she was riding.

After the accident she was taken to a hospital. There were four small superficial cuts to the area over her left

knee which were cleaned and dressed. She then was discharged and returned to the college dormitory. The next day her left knee was greatly swollen, and it pained and throbbed. However, she managed to attend her classes, and at no time did she miss any classes, except that she was excused from gym classes for a month. Two or three days after the accident she consulted Dr. Meisinger, the college physician, and he prescribed hot compresses. She saw Dr. Meisinger on several occasions after that. She also consulted her family physician at Harvard, Illinois, but he prescribed the same treatment as Dr. Meisinger.

After about six weeks the swelling receded, but the plaintiff testified that as of the time of trial, which was more than three years after the accident, her knee on occasion would still swell and give her pain. This would occur after she had been on her feet for many hours doing hospital work in connection with her nurse's training. She estimated that such instances of swelling and pain had occurred on an average of two or three times per week ever since the accident. She also testified that there had been occasions when her knee suddenly buckled or gave way.

On October 2, 1957, after the plaintiff had commenced the instant action, she consulted Dr. Verdone. Dr. Verdone made an examination and took x-rays. He prescribed a "Thomas heel," which the plaintiff was unable to obtain and cortisone to relieve the pain, but the plaintiff did not take the cortisone. She saw Dr. Verdone four or five times in all.

The only medical witnesses who testified at the trial were Dr. Verdone and Dr. Ansfield, the former being called by the plaintiff and the latter by the defendants.

Dr. Verdone is a physician engaged in general practice. Because of the fact that he had not been consulted by the plaintiff until after she had commenced the action, the trial

court refused to permit him to testify to subjective symptoms communicated by the plaintiff. He testified that his diagnosis of the plaintiff's knee condition was that of a tear of the semilunar cartilage. The objective sympton upon which he based this was a clicking which he heard on the flexing of the plaintiff's knee. He stated that damaged cartilages will not regenerate or grow, and will not heal. Comparative measurements taken by him of the plaintiff's calves and thighs disclosed that the left calf was one-half inch smaller in circumference than the right, and the left thigh was five-eights of an inch less in circumference than the right. It was Dr. Verdone's opinion that these differences in measurements were due to atrophy. He defined atrophy as a process of wasting or becoming smaller as a result of not complete use of an extremity. The X-rays taken by the doctor disclosed a normal left knee, but he stated this was because cartilage is not opaque and therefore is not shown on X-rays.

Dr. Ansfield is a physician who specializes in orthopedic surgery. On February 6, 1959, he examined the plaintiff on behalf of certain of the defendants. The X-rays taken at that time disclosed no bone injury. Measurements taken of the legs disclosed substantially the same slight atrophy in the plaintiff's left leg as did those taken by Dr. Verdone. However, Dr. Ansfield was unable to hear the clicking sound in the left knee upon the plaintiff flexing the same which Dr. Verdone testified he heard. Dr. Ansfield found no limitation in motion of the knee. He stated that the only way by which it could be determined that there was a torn cartilage would be by performing an exploratory operation, but admitted that there was a possibility of cartilage injury. It was his opinion that there was still some soreness in the knee of a mild character.

Dr. Ansfield further testified it was his opinion that at the time that he examined the plaintiff she had a five

per cent disability of the left knee. He was then asked by one of the counsel for the defendants what he took into consideration in estimating such disability and he stated:

> "I took into consideration, first of all, her sincerity. I was impressed that she was perfectly honest; that I was ready to accept whatever she said at face value, and that she said that she had some pain and some tenderness off and on; it wasn't constant. On the basis of that, I felt that there was a small amount of disability in the knee."

Dr. Ansfield, in response to a question about the "probability" of surgery being performed on the plaintiff's knee at some future time, gave this answer:

> "Well, I would say this: *That I don't believe the knee is going to change.* I don't think it's going to get any worse. I believe that, if it is not going to get any worse, the patient might not want to do anything more about it. However, it's still a matter that rests with her. That's all I can say about that." (Italics supplied.)

The italicized sentence in such answer, coupled with the doctor's estimate of a five per cent disability to the knee existing as of the time of his examination some three years after the accident, is sufficient to permit the jury to draw the reasonable inference that such disability was permanent in character.

In *Diemel* v. *Weirich* (1953), 264 Wis. 265, 58 N. W. (2d) 651, this court held that, where an injury is subjective in character and of such nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, there must be competent expert opinion testimony bearing on the permanency of such injury, or the likelihood that the injured person will endure future pain and suffering, before recovery may be allowed therefor; and that the unsupported

subjective statements of the injured party, not a medical expert, are not sufficient. The symptoms of occasional swelling of the knee and pain, to which the plaintiff testified, are of this latter category. While swelling of the knee is an objective and not a subjective symptom, neither Dr. Verdone nor Dr. Ansfield testified to observing any swelling of the knee. However, the slight atrophy of the left leg, as disclosed by the comparative measurements of the calves and thighs of both legs, constitutes an objective finding. The clicking noise which Dr. Verdone testified he heard when the plaintiff flexed the knee is also objective and not subjective in character.

Furthermore, we do have expert medical testimony that there was some permanent injury. Dr. Verdone gave it as his diagnosis that there was a torn semilunar cartilage, and he testified that cartilage will not repair. Dr. Ansfield testified that the plaintiff had a five per cent disability of the knee when he examined her in February, 1959, and that he did not believe the knee would change in the future.

The defendants contend that there is no competent medical evidence of permanent injury because both Drs. Verdone and Ansfield were employed after suit was commenced for the purpose of giving testimony rather than treatment. It is pointed out that Dr. Verdone based his opinion partly on subjective symptoms and Dr. Ansfield's estimate of disability was based entirely on the subject complaints of the plaintiff.

This court in *Schields* v. *Fredrick* (1939), 232 Wis. 595, 598, 288 N. W. 241, stated:

> "Ordinarily, the opinion of a physician based upon subjective symptoms related to him by the injured person during the course of an examination by him for the purpose of testifying rather than for the purpose of treatment is not admissible in evidence. *Katt* v. *Wisconsin Central R. Co.*, 121 Wis. 503, 99 N. W.

217; 1 Wigmore, Evidence, p. 2250, sec. 1747; 20 Am. Jur. p. 530, sec. 625; 2 Jones, Evidence, p. 2233, sec. 1217; *Maine* v. *Maryland C. Co.*, 172 Wis. 350, 178 N. W. 749; *Stewart* v. *Everts*, 76 Wis. 35, 44 N. W. 1092; and cases cited in note 21 L. R. A. (N. S. 826)."

The weakness in this contention of the defendants is that the testimony of the two physicians bearing on permanent injury was admitted without objection being made at the time the questions were put. Furthermore, Dr. Ansfield's testimony with respect to the five per cent disability, and the factors upon which he based the same, together with his opinion that there would be no future change in the condition of the knee, was part of his testimony on direct examination when he was being examined by one of defendants' counsel. The rule of the *Schields* and *Kath* cases is one which is restricted to the admissibility of evidence only. Once opinion evidence based upon subjective evidence gets into the record without objection it may be considered by the jury in making their findings.

The defendants further maintain that the opinion testimony of the two physicians is insufficient to sustain the jury's finding of permanent injury because elicited by questions which did not call for an opinion based upon a *reasonable degree of medical certainty or probability.* For example, the question put to Dr. Verdone which brought forth the answer of a diagnosis of "torn internal semilunar cartilage" was, "Then what was your diagnosis as to her condition, the condition of that knee, doctor?" Similarly, Dr. Ansfield's statement, "I don't believe the knee is going to change" was not made in response to a question which requested an opinion to a reasonable degree of medical certainty or probability. We recently dealt with this same problem in *Unruh* v. *Industrial Comm.* (1959), 8 Wis. (2d) 394, 402, 99 N. W. (2d) 182. It was

therein held that conclusions of a medical expert witness should amount to an assertion of his professional opinion, and that an opinion expressed in terms of "I feel" or "I believe" are sufficient. Of course an expert opinion expressed in terms of a mere possibility is insufficient to sustain a finding. *Michalski* v. *Wagner* (1960), 9 Wis. (2d) 22, 100 N. W. (2d) 374.

It is our considered judgment that there was sufficient competent medical testimony to support the jury's finding that the plaintiff did sustain a permanent injury to her left knee as a result of the accident. Therefore, it was error for the trial court to have changed the answer in the verdict which so found.

We turn now to the question of whether the $5,000 awarded for permanent injury is excessive. We have already recounted all of the pertinent evidence bearing upon permanent disability except that relating to a possible operation to remove the torn cartilage which Dr. Verdone testified is present in the plaintiff's left knee.

Dr. Ansfield testified that athletes frequently sustain torn cartilage of the knee and undergo operations for the same. He further stated that after such operations these athletes are usually able to resume their athletic activities. It was his further testimony that in a majority of cases patients who undergo such an operation have a good, normally functioning knee afterwards. There was further evidence that such an operation would cost $200 and that the patient would require two weeks of hospitalization at an approximate cost of $364. In addition to medical and hospital costs, such operation would entail some pain and suffering and some loss of earnings.

There is no legal requirement that the plaintiff undergo such an operation in order to minimize her damages. The only purpose in reviewing this evidence relating to a pos-

sible operation is to consider whether it would sustain the $5,000 award if the plaintiff should elect to undergo such operation. We are satisfied it would not.

It is our considered judgment that the award of $5,000 for permanent injury is excessive in that the evidence will not support the same. Heretofore, it has been customary in such a situation to fix the lowest amount that an unprejudiced jury properly instructed might award for damages, and then to grant the plaintiff the option of accepting such amount or having a new trial. However, in his dissenting opinion in *Gennrich* v. *Schrank* (1959) 6 Wis. (2d) 87, 93 N. W. (2d) 876, Mr. Justice Fairchild advanced another alternative for dealing with excessive verdicts which are not the result of perversity or error committed during the course of trial. We quote from such dissenting opinion as follows (at p. 94):

> "But where there has been no error or perversity, there would be no injustice to defendant in giving plaintiff an option of a new trial or judgment for an amount fixed by the court as a fair and reasonable award under the evidence. Such a rule would give greater protection to the plaintiff. While he could still choose a new trial, his alternative would be more liberal to him than under the present rule. It would sufficiently protect the defendant from the excessive award.
>
> . . . . .
>
> "It is undoubtedly in the public interest to avoid unnecessary second trials and to seek an earlier determination of the litigation at a figure which is within the range of fairness. There is no reason, where the range is wide, for requiring the court to fix a low figure when the jury has already indicated that it thinks that the plaintiff deserves the highest figure the evidence will sustain."

During the fifteen months which have elapsed since *Gennrich* v. *Schraub*, *supra*, was decided, the members of this court have had an opportunity to discuss the alternative proposed in such dissenting opinion with lawyers and trial judges. The impression gained from these informal discussions is that most lawyers and trial judges would approve of this court adopting such alternative. We are firmly of the opinion that if the plaintiff were granted the option of accepting a reasonable amount as determined by the trial or appellate court, instead of the least amount that an unprejudicial jury properly instructed might award, the number of instances in which the plaintiff would be likely to refuse such option and elect a new trial would be greatly reduced. Furthermore, such alternative is one which appeals to our sense of justice, and is widely used in other jurisdictions.

However, there is one further facet of the problem that must be resolved in arriving at a determination of whether this court should now adopt such alternative, and that is the constitutional issue. Sec. 5, art. I, of the Wisconsin constitution, makes a trial by jury mandatory in "all cases at law without regard to the amount in controversy." The right to trial by jury preserved by this provision of our constitution is the right as it existed at the time of the adoption of the constitution in 1848. *Campbell* v. *Sutliff* (1927), 193 Wis. 370, 214 N. W. 374, 53 A. L. R. 771. The power of courts to set aside excessive verdicts and to grant new trials was firmly established even before the adoption of the United States constitution. *Ibid.* In the early case of *Corcoran* v. *Harran* (1882), 55 Wis. 120, 127, 12 N. W. 468, the court declared:

> "We must therefore hold that, in actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the

excess, and in case he does so order the verdict to stand for the residue. Certainly the practice will tend to promote justice and lessen the expense to litigants and the public. Besides, the allowance of such option is no more of an exercise of arbitrary power by the trial judge than it would be for him to set aside the verdict absolutely upon the sole ground that it is excessive, and then, in effect, direct a jury to bring in a verdict for a smaller sum, but not in excess of an amount named by the court."

We interpret such quoted statement as not requiring that the amount of the judgment to be remitted by the plaintiff to be reduced to the least amount for which a verdict might be rendered by the jury and be permitted to stand by the court. Some of the cases from other jurisdictions cited by the court in its opinion in support of such declared rule lend credence to this interpretation.

The case of *Corcoran* v. *Harran, supra*, was followed by that of *Baker* v. *Madison* (1885), 62 Wis. 150, 22 N. W. 141, which was an action to recover for personal injuries resulting from a defective condition of a street. The jury awarded $6,000 damages which the supreme court held to be excessive, and the plaintiff was granted the option of remitting $2,500 of the judgment or having a new trial. The sum of $3,500, which under such mandate the plaintiff had the right to retain as damages, clearly was not the lowest amount that a jury might properly allow. This is established by the fact that the case had gone through two prior trials in which the juries had fixed the damages at $2,500 and $3,000.

However, without expressly overruling the sensible rule laid down by the *Corcoran* v. *Harran* and *Baker* v. *Madison* Cases, the court did abandon the same in the later cases of *Heimlich* v. *Tabor* (1905), 123 Wis. 565, 102 N. W. 10, and *Campbell* v. *Sutliff, supra*. In such later cases it was

in effect held that, in cases involving unliquidated damages, the granting to the plaintiff of the option, to accept any amount of damages less than the lowest amount for which the court would permit a verdict to stand, would violate the defendant's right to a jury trial. The rule of the *Heimlich* Case has continued to be the acknowledged law of this state ever since it was announced in 1905.

In most jurisdictions in this country, when the jury has returned a verdict which the trial or appellate court deems excessive, but not caused by passion or prejudice, the courts follow the practice of allowing the plaintiff the option of avoiding a new trial by remission of the excess above an amount which the court considers reasonable. Correction of Damage Verdicts by Remittitur and Additur, 44 Yale Law Review (1934) 318; Remittiturs and Additurs, 49 West Virginia Law Quarterly (1942) 1; and Annotations in 53 A. L. R. 779 and 95 A. L. R. 1163. This is also the practice followed in the federal courts. See *Fornwalt* v. *Reading Co.* (D. C. Pa. 1948), 79 Fed. Supp. 921, wherein the court determined that $7,500 was the "fair amount" of plaintiff's damages for personal injuries and granted the plaintiff the option of remitting the excess.

The United States supreme court in a unanimous opinion by the first Justice Harlan held in *Arkansas Valley Land and Cattle Company* (1889), 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, that such practice of granting the plaintiff the option to remit the excess amount by which a verdict is determined by the court to be excessive does not violate the right to trial by jury guaranteed by the Seventh amendment of the United States constitution. A number of the state courts have directly passed upon the constitutional issue and have upheld the rule of basing the amount to be remitted upon the excess over and above a reasonable amount. Among the cases so holding are: *Sewell* v. *Sewell*

(1926), 91 Fla. 982, 109 So. 98; *Burdict* v. *Missouri Pacific Ry. Co.* (1894), 123 Mo. 221, 27 S. W. 453; and *Alter* v. *Shearwood* (1926), 114 Ohio St. 560, 151 N. W. 667.

As previously mentioned herein, it was acknowledged that courts had the power to set aside excessive verdicts and grant new trials long before either the federal or state constitutions were adopted. If a court has the power to hold a verdict for a certain amount excessive, it necessarily follows that it has the power to determine an amount which is not excessive. As the Missouri court well stated in *Burdict* v. *Missouri Pacific Ry. Co., supra,* "If it possesses the power to say the one thing, it possesses the power to say the other." Therefore, when a court determines that a certain amount is a reasonable amount to allow for plaintiff's unliquidated damages, it is the equivalent of holding that such amount is not excessive.

It is our considered judgment that we should adopt the rule that where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages, or of having a new trial on the issue of damages. In so doing we are reverting to the early rule of *Corcoran* v. *Harran, supra,* and *Baker* v. *Madison, supra.* This necessitates overruling *Heimlich* v. *Tabor, supra,* and *Campbell* v. *Sutliff, supra,* insofar as they hold such a rule violates the defendant's constitutional right to a trial by jury.

Based upon a careful review of all of the pertinent evidence bearing upon permanent disability we determine that $3,000 is a reasonable sum to award to the plaintiff for permanent disability. Therefore, the plaintiff should be accorded the option of accepting judgment for such

sum, together with the sum of $1,500 awarded for pain and suffering, or a total of $4,500, or of having a new trial confined to the issue of damages.

By the Court:—The judgment is modified by increasing the amount of plaintiff's damages from $1,500 to $4,500, exclusive of costs, unless within twenty days from April 5, 1960, the plaintiff shall file with the clerk of this court a notice in writing that she elects to have a new trial limited to the issue of damages only. If such notice electing such new trial is timely filed, the judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

APPENDIX C.

CONFLICTING OPINIONS.

EXHIBIT 10.

SUMMARY OF CASES.

In the instant case, *Lucas* v. *State Farm et al.*, 17 Wis. 2d 568, the Wisconsin Supreme Court stated:

> "* * * The power of a court to set aside a jury verdict or damages because of being excessive has been recognized since long before the adoption of the federal or state constitution and does not violate *plaintiff's* right to jury trial. (Emphasis supplied) * * *."

The court cited as authority the case of *Arkansas Valley Land and Cattle Co.* v. *Mann*, (1889), 130 U. S. 69. That case stated that *defendant* lost no rights when his obligation was reduced and the damages were for material things computable by mathematics, and the Court stated it was not passing on *plaintiff's* rights, whose amount of recovery was reduced:

> "* * * it was still open to (defendant) to show in the court * * * that plaintiff was not entitled to a verdict in any sum * * * and to insist * * * that errors of law were committed to entitle him to a new trial. * * * Under what circumstances, if any, a party who is compelled to remit a part of the verdict in order to prevent a new trial can complain before this Court, we need not decide in the present case. * * * We could only, in that case, have considered matters of law arising upon the face of the record * * * the amount for which the plaintiff was entitled to a verdict was ascertained by the court, after a calculation based upon the price of cattle. * * *"

Burdict v. *Missouri Pac. R. Co.* (1894), 123 Mo. 221, 27 S. W. 453 was also cited as authority. Here the *defendant* complained of the reduction against *plaintiff*. This case was decided on lack of evidence. The court stated there was very little evidence as to plaintiff's former or present capacity for labor or to show he was not in good health.

Powers v. *Allstate et al.*, 10 Wis. 2d 78, 102 N. W. 2d 393:

> "* * * in *Gennrich* v. *Schrank* (1959), 6 Wis. 2d 87, 93 N. W. (2d) 876. Mr. Justice Fairchild advanced another alternative for dealing with excessive verdicts which are not the result of perversity or error committed during the course of trial * * * there would be no injustice to *defendant* in giving *plaintiff* an option for new trial or judgment for an amount fixed by the court (emphasis supplied) * * * during the fifteen months that have elapsed since *Gennrich* v. *Schrank supra* was decided, the members of this court have had an opportunity to discuss * * * such opinion with lawyers and trial judges. The impression gained * * * is that most lawyers and trial judges would approve * * * adopting such alternative. * * * in the early case of *Corcoran* v. *Harran* (1882), 59 Wis. 120, 12 N. W. 468. * * *"

The *Corcoran (supra)* case, along with *Baker* v. *City of Madison* (1885), 62 Wis. 150, 22 N. W. 141, were abanddoned in *Heimlich* v. *Tabor* (1905), 123 Wis. 565, 102 N. W. 10, and *Campbell* v. *Sutliff* (1927), 193 Wis. 370, 214 N. W. 374, 53 A. L. R. 771.

Campbell v. *Sutliff (supra)* concerned itself with loss of defendant's rights to jury trial.

Baker v. *City of Madison (supra)* was decided on lack of evidence.

Railroad Co. v. *Herbert*, 116 U. S. 642, held the damages were palpably outrageously excessive.

Blunt v. *Little*, 3 Mason 102, held jury had committed gross error.

Stafford v. *Haircloth*, 2 Cliff. 82. held jury were influenced by prejudice or a reckless disregard of the instructions.

In *Powers* v. *Allstate (supra)* the court felt that by arbitrarily reducing the damage award to a reasonable sum which a plaintiff is willing to accept, the defendant would pay and thus end the litigation.

However in the instant case, *Lucas* v. *State Farm (supra)* the court went further by allowing defendant to appeal although plaintiff should consent to the modification, with the result that plaintiff is harassed by further litigation without an opportunity of review and he is compelled to accept the modification if defendant does not prevail.

The instant case may even compel a court to reduce an award:

> "* * * there may be some uncertainty in the procedure to be followed where a trial court has reduced a verdict. * * *
>
> 1. On motions after verdict the trial court should enter his decision which includes a determination that the jury award is excessive. * * *"

The most serious errors in the *Powers* and *Lucas* cases *(supra)* is that the court is permitted to make its own medical diagnosis mitigating the injuries, or overlooking credible evidence, selecting negative medical testimony, passing on credibility of witnesses and weight of evidence and inferences therefrom, as a method of declaring the verdict excessive for the purpose of modification.